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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

16 R.S., a minor by and through his  
17 Guardian Ad Litem STEPHANIE  
SENTELL, and PAMELA AMICI,

| ) Lead Case No.: SACV 11-00536-AG-RNBx  
| ) Consolidated Case No.: SACV11-06379-  
| ) AG(RNBx)

18 | Plaintiffs,

Before the Hon. Andrew J. Guilford]

19 | VS.

**PLAINTIFFS' JOINT MOTION IN  
LIMINE TO EXCLUDE  
DEFENDANTS' ANIMATION OF  
THE INCIDENT; DECLARATION  
OF DALE K. GALIPO**

20 CITY OF LONG BEACH, VICTOR  
21 ORTIZ, JEFFREY SHURTEFF, and  
DOES 3-10, inclusive,

22 | Defendants.

23 MARK ZERBY,

Plaintiff,

VS.

<sup>26</sup> CITY OF LONG BEACH, et al.

### Defendants.

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I. INTRODUCTION**

3                   This is an action that arises out of a December 12, 2010 incident, when  
 4 decedent Douglas Zerby was fatally shot by two Long Beach police officers without  
 5 any warning, while Mr. Zerby sat on the staircase landing of a private residence,  
 6 waiting for his friend and holding a garden hose water nozzle in his hand.

7                   The officers admit that Mr. Zerby had not and was not committing a felony,  
 8 or any crime for that matter. He had not threatened anyone. He had not disobeyed  
 9 any police command and in fact was unaware of the officers' presence because the  
 10 officers concealed their presence from him, and never gave him a command or  
 11 warning prior to shooting him.

12                  Plaintiffs seek to exclude defendants' animation that purports to depict the  
 13 scene of the incident and the placement and positioning of the decedent and the  
 14 defendant officers for several reasons. First, the animation was not timely disclosed.  
 15 Second, the animation lacks foundation because it is contrary to the physical  
 16 evidence, the testimony of the officers and defendants' own expert Judy Melinek.  
 17 Third, the animation was clearly created based on assumptions and computer  
 18 programming inputs that were not tested by cross-examination in deposition before  
 19 trial. Defendants' designated expert Melinek is unable to explain the proper  
 20 foundation for it, because it was created by other undisclosed animation experts.  
 21 Fourth, the animation should be excluded under Federal Rule of Evidence 403 as  
 22 misleading and confusing to the jury as it is contrary to the testimony of the officers  
 23 and is not a fair and accurate depiction of the incident. Therefore, the Court should  
 24 exclude defendants' animation video as it was not timely or properly disclosed,  
 25 lacks foundation, is misleading, and inaccurately depicts the shooting incident, and  
 26 is unfairly prejudicial to plaintiffs.

27                  ///

28                  ///

1           **II. THE ANIMATION LACKS FOUNDATION AS IT IS CONTRARY TO**  
 2           **THE OFFICERS' TESTIMONY AND PHYSICAL EVIDENCE**

3           The alleged animation of the incident lacks foundation, as it is contrary to the  
 4 testimony of the involved officers and the physical evidence and the opinions of the  
 5 experts, including the defense experts. For example, the involved officers testified at  
 6 their depositions that they had cover and concealment behind brick walls at the time  
 7 of the incident, but the animation inaccurately depicts them as exposed and fully  
 8 visible. The brick walls are depicted as paper thin and hollow. It mischaracterizes  
 9 the decedent's appearance as dark-haired, gaunt and sinister. It also  
 10 mischaracterizes the position and posture of the decedent by creating anatomical  
 11 distortions in the arms and legs.

12           The animation depicts the decedent as holding the water nozzle (which the  
 13 animation attempts to make look like a gun) in both hands in a shooting grip and  
 14 stance. In the illustration titled "Officer Cruz View", the decedent is depicted  
 15 holding the nozzle with a two-handed grip. This is contrary to Officer Cruz' own  
 16 testimony that he did not see the decedent hold the nozzle with a 2-handed grip prior  
 17 to the shots being fired or as the shots were being fired. Officer Cruz was observing  
 18 Mr. Zerby through a magnifying scope on his rifle. The two-handed grip is also  
 19 unsupported by Officer Shurtleff's testimony who concedes he cannot say whether  
 20 Mr. Zerby had the nozzle in one hand or two hands when he was shot.

21           The animation also attempts to depict the sequence of the shots when the  
 22 order of the shots cannot be ascertained according to expert testimony. The  
 23 animations titled "Trajectory Group" 1 to 4, lack foundation because not only do  
 24 they all depict paper-thin hollow walls, they also depict the officers as fully visible,  
 25 which is contrary to their testimony that they had concealed themselves behind the  
 26 brick walls and made sure they could not be seen. The evidence is that Mr. Zerby  
 27 did not see the officer prior to the shooting, as they had cover and concealment and  
 28 never announced their presence.

1       The animation also depicts the window above the decedent as see-through,  
 2 which is contrary to the physical evidence at the scene. The apparent suggestion is  
 3 that the officers were not shooting into an occupied apartment.

4       Since the animation depicts the incident in a way that is inconsistent with the  
 5 testimony of the officers and inconsistent with the physical evidence and expert  
 6 testimony, there is no foundation for the animation and it should be excluded.  
 7 Further, it is unclear as to the basis and foundation used by the undisclosed experts  
 8 who actually did the animation.

9 **III. DEFENDANTS' EXPERT JUDY MELINEK, M.D.'s TESTIMONY**  
 10 **FURTHER SUPPORTS THE EXCLUSION OF THE ANIMATION**

11       Defendants' retained forensic pathologist Judy Melinek, M.D. also gave  
 12 deposition testimony that further supports the Court's exclusion of the defendants'  
 13 alleged animation of the shooting incident. First, Dr. Melinek conceded that she  
 14 could not do the animation herself. (*See Exhibit A, Melinek Deposition, 10:21-*  
 15 *11:8.*). Second, she testified that the shots to decedents left and right arms could  
 16 have been sustained without any object in the right or left hand and that the  
 17 decedent could not have had his hands together holding an object during the shots.  
 18 (*See Exhibit A, Melinek Deposition, 20:19-22:4, 31:21-32:6.*). Third, Dr. Melinek  
 19 opines that the first shot that struck the decedent may have been the shoulder shot,  
 20 but that she could not tell the position of decedent's right arm when that shot was  
 21 sustained. (*See Exhibit A, Melinek Deposition, 80:6-11.*). When asked whether Mr.  
 22 Zerby was angled more toward Officer Shurtleff or more toward Officer Ortiz when  
 23 the shots were fired, Dr. Melinek testified that she cannot answer that question  
 24 because she has not done the analysis. (*See Exhibit A, Melinek Deposition, 62:4-*  
 25 *63:9.*). Thus, the angle of Mr. Zerby in the animation lacks foundation. Dr.  
 26 Melinek does agree that Mr. Zerby was slumped forward when the shots occurred,  
 27 but this fact is not depicted in defendant's animation. (*See Exhibit A, Melinek*

1 Deposition, 39:6-25, 72:11-25.). Dr. Melinek further testified that the wounds do  
 2 not tell the position of the arms of Mr. Zerby when he was shot.  
 3 (*See Exhibit A, Melinek Deposition, 86:7-18.*). Moreover, Dr. Melinek did not  
 4 match the shots with the bullet impacts to the wall behind Mr. Zerby, which the  
 5 animation attempts to do. (*See Exhibit A, Melinek Deposition, 90:6-17.*) Dr.  
 6 Melinek also conceded that Mr. Zerby's right hand does not have to be pointed out  
 7 when he was shot and his right hand does not need to be in any specific position.  
 8 (*See Exhibit A, Melinek Deposition, 122:21-124:6.*) Dr. Melinek again  
 9 testified that Mr. Zerby did not have an object in both hands when he was shot. (*See*  
 10 *Exhibit A, Melinek Deposition, 140:4-13.*) Based on the inconsistencies between  
 11 the testimony, physical evidence, and even Dr. Melinek's testimony, the animation  
 12 should be excluded as lacking foundation and misleading.

13 **IV. DEFENDANTS' DISCLOSURE OF THE ANIMATION ON THE EVE**  
 14 **OF TRIAL CAUSES UNFAIR PREJUDICE BECAUSE IT**  
 15 **PREVENTED PLAINTIFFS FROM SEEKING DISCOVERY FROM**  
 16 **THE EXPERT ANIMATORS WHO CREATED THE ANIMATION**

17 The Court should exclude Defendants' animation videos at trial because the  
 18 experts who created the animation were never disclosed or properly designated.  
 19 These animators used certain assumptions when they entered computer  
 20 programming information into their unknown software, in order to create anatomical  
 21 distortions in Mr. Zerby's arms and legs. They also used certain assumptions to  
 22 create the trajectories, but decided not to depict the relative height between Officer  
 23 Ortiz who was kneeling on the ground 38 feet away, as the decedent sat on a landing  
 24 at least 4 feet high. The animation of the trajectories is highly misleading.

25 The untimely disclosure of the animation has prejudiced Plaintiffs by failing  
 26 to provide them with the opportunity to depose the creators of the animation. Now  
 27 that discovery has ended Plaintiffs are at a severe disadvantage as to questioning the  
 28 validity of the positioning of the decedent and involved officers and sequence of

1 shots and events depicted in the animation. In a case where the positioning of the  
 2 decedent and involved officers is of paramount importance, plaintiffs' inability to  
 3 depose the creators of the animation is unfairly prejudicial to plaintiffs. As such, the  
 4 defendants' alleged animation should be excluded.

5 **V. THE ANIMATION IS UNDULY PREJUDICIAL UNDER F.R.E 403**

6 In addition to its late disclosure and lack of foundation as discussed above,  
 7 the Court should use its discretion under Federal Rule of Evidence 403 and exclude  
 8 defendants' animation videos because they are misleading and confusing to the jury.  
 9 Rule 403 excludes relevant evidence "if its probative value is substantially  
 10 outweighed by the danger of the unfair prejudice, confusion of the issues, or  
 11 misleading the jury, or by consideration of undue delay, waste of time, or needless  
 12 presentation of cumulative evidence." FED. R. EVID. 403.

13 Since the animation is inconsistent with the testimony of the officers and  
 14 expert testimony, it will be more confusing and prejudicial than helpful. The jury  
 15 may incorrectly assume the animation shows how the incident occurred. Of course,  
 16 defendants' animation inappropriately makes it look like Mr. Zerby had a gun  
 17 pointed at the officers in a two handed shooting position and that officers were  
 18 exposed to Mr. Zerby and had to shoot in self-defense. This is contrary to the  
 19 physical evidence, the expert testimony on both sides, and the deposition testimony  
 20 of the officers. For these reasons, the defendants' animation should be excluded  
 21 under Federal Rule of Evidence 403.

22 **VI. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully request that this Court grant  
 24 Plaintiffs' Motion to exclude defendants' animation video of the incident. Plaintiffs  
 25 also agree that if the Court grants their motion to exclude the defendants' animation,  
 26 plaintiffs would withdraw their animation, so that no animation would be shown at  
 27 trial.

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1 DATED: February 14, 2013

LAW OFFICES OF DALE K. GALIPO

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Bv \_\_\_\_\_ /s/ Dale K. Galipo

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Dale K. Galipo  
Attorneys for Plaintiffs R.S. and Pamela  
Amici

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DATED: February 14, 2013

MARDIROSSIAN & ASSOCIATES, INC.  
BECK LAW FIRM

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By: \_\_\_\_\_ /s/Rowena J. Dizon

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Rowena J. Dizon, Esq.

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Attorneys for Plaintiff MARK ZERBY

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1                   **DECLARATION OF DALE K. GALIPO**

2                   I, Dale K. Galipo, declare and state as follows:

3                   1. I am an attorney duly licensed to practice law before all courts within  
4 the State of California and represent the Plaintiffs in the above-captioned action.

5                   2. I am personally familiar with the facts contained herein and would and  
6 could competently testify thereto if called upon to do so.

7                   3. I am filing this Declaration in support of Plaintiffs' Joint Motion *In*  
8 *Limine* to Exclude Defendants' Animation of the Incident.

9                   4. On January 25, 2013, I personally deposed Defendants' expert, Judy  
10 Melinek, MD. True and correct portions of Dr. Melinek's deposition are attached  
11 hereto as Exhibit "A".

12                  I declare under penalty of perjury under the laws of the United States of  
13 America that the foregoing is true and correct.

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15 DATED: February 14.2013

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/s/ Dale K. Galipo

16                  Dale K. Galipo

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